FIDUCIARY LITIGATION: DUTIES AND OBLIGATIONS BETWEEN PARENT, CHILD, AND THIRD PARTIES

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FOREWORD

“[P]arents generally stand in the role of fiduciaries toward their minor children.” S.V. v. R.V., 933 S.W.2d 1, 8 (Tex. 1996); see Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex.1962) (confidential relationships may arise from moral, social, domestic, or purely personal relationships, such as family relationships, where there is evidence of justifiable trust and confidence to create a fiduciary relationship).
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FIDUCIARY LITIGATION DUTIES AND OBLIGATIONS BETWEEN PARENT, CHILD, AND THIRD PARTIES (PowerPoint Presentation)
FIDUCIARY LITIGATION: DUTIES AND OBLIGATIONS BETWEEN PARENT, CHILD, AND THIRD PARTIES

I. INTRODUCTION

The legal authority creating or recognizing a fiduciary relationship is derived from statutory or common law. Categorically, a fiduciary relationship can generally be thought of as being created by status, contract, or fiduciary relation. Tamar Frankel, *Fiduciary Law*, 71 Calif. L. Rev. 795 (1983). This author feels this can be further simplified – a fiduciary relationship arises either from the relationship between the parties or because it was a bargained for relationship.

A fiduciary relationship recognized due to the relationship between parties generally involves one party (the fiduciary) as having partial or full monopoly over the means for satisfying the needs of the other party (the dependent or beneficiary). *Id.* at 798-799. The second method for creation of a fiduciary relationship is by contract: 1) where the parties determine their own needs, 2) bargain to satisfy them, and 3) enforce that bargain as needed. *Id.*

The parent-child fiduciary relationship clearly falls into the status category. Statutory and common law define the entry and exit points for these status fiduciary relationships, with the law often only defining the outer limits of the fiduciary’s authority, giving a higher priority to the security of the parties than the dependent’s or beneficiary’s freedom. *Id.* As a result, there is a heightened need for practitioners dealing with these status based fiduciary relationships to not only be informed of the law but also to be vigilant for abuse of the relationship by the fiduciary due to the inequality of power between the parties.

Not surprisingly, the duties and obligations between parent, child, and third parties in Texas arise from statutory and common law authority. Parents “generally stand in the role of fiduciaries toward their minor children.” *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996). This article outlines the facets of these duties and obligations during the child’s minority.

II. THE FIDUCIARY RELATIONSHIP

A. The Fiduciary

A fiduciary is “any person who occupies a position of peculiar confidence towards another.” *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512 (Tex. 1942).

B. The Fiduciary Relationship

A fiduciary relationship exists when parties are “under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation[ship].” *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980) (citing Restatement, Torts, Section 874).

These relationships often arise as a matter of law, but may also arise as a matter of fact through informal relations where one party trusts and relies upon another. *Moore*, 595 S.W.2d at 507. In short, a fiduciary relationship is not limited to formal cases, such as trustee and beneficiary in a trust, attorney and client, guardian and ward, etc., “but it exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed, and the origin of the confidence is immaterial, and may be moral, social, or domestic, or merely personal.” *Id.* at 507 (citing *Higgins v. Chicago Title & Trust Co.*, 312 Ill. 11, 18, 143 N.E. 482, 484 (1924)). Fiduciary duties between parent and child can be layered, where the parent has an informal relationship with the child that gives rise to a fiduciary relationship as a matter in fact, but is also a fiduciary as a matter of law through a UTMA (Uniform Transfers to Minors Act, formerly Uniform Gift to Minors Act), 529, trust, or other instrument in which the parent acts as the child’s trustee, principal, guardian, or custodian.

A fiduciary implicitly agrees to certain duties by entering into a fiduciary relationship. Generally, these duties can be classified as:


4. *Duty of Full Disclosure*. The “fail safe” mechanism of the fiduciary relationship
is the duty of full disclosure. *Jackson Law Office v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied). A fiduciary has much more than the traditional obligation to avoid making any material misrepresentations; he has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes. *Id. ; Montgomery v. Kennedy*, 669 S.W.2d 309, 312-14 (Tex. 1984).

Stacy L. Kelly, *Duties of Fiduciaries: Agents Under A Power of Attorney, Trustees, Executors, Guardians, and Guardians Ad Litem*, Wills and Probate Institute, University of Houston Law Center, May 2002 (http://www.tklaw.com/resources/documents/Duties%20of%20Fiduciaries%20Agents%20Under%20Power%20of%20Attorney%20%28Kelly%20S.%29.pdf). See the aforementioned informative article by Stacy Kelly on the subject, which fully details the general duties of a fiduciary quoted from her work above and, additionally, the duties of agents under a power of attorney, trustees, executors/administrators, guardians, and guardians ad litem/next friends.

**C. Breach of a Fiduciary Duty**

1. **Analysis to Determine Breach**

   All fiduciary cases, and the determination of whether a cause of action exists, begin with the analysis we learned in law school, and often repeated by noted Dallas trial lawyer Charles M. Wilson, III in his tort lectures for the State Bar of Texas on duty, breach of duty, causation, and damages, to wit:

   Q1. Is there a duty (statutory, contractual or common law) owed by the fiduciary to the beneficiary?

     *If yes,*

   Q2. Has there been a breach of that duty by the fiduciary?

     *If yes,*

   Q3. Has the breach by the fiduciary produced, caused or resulted in actual damages to the beneficiary?

     *If yes,*

   Q4. What actual economic damages, or pecuniary loss, to the beneficiary resulted from the breach by the fiduciary?

And,

Q5 By clear and convincing evidence, was the economic or pecuniary loss or harm to the beneficiary the result of fraud, malice or gross negligence of the fiduciary?

*If yes,*

Q6 What sum of money, if any, if now paid in cash, should be assessed against the Fiduciary and awarded to the Beneficiary as exemplary damages, if any, for the conduct in question?

2. **Controlling Law — Is the Breach Statutory, Contractual, or Arising Under Common Law**

   As discussed previously, a fiduciary duty may or can be created under a variety of contexts. When evaluating a fiduciary case, it is important at the outset to determine what applies by determining whether the relationship was:

   (1) Created or controlled by a specific statute, with specific elements of duty or proof; or,

   (2) Created or modified by a contractual agreement between the fiduciary and beneficiary; or,

   (3) Created or controlled by common law.


**III. REFERENCES**

Useful references in the form of statutes, cases, books, articles, and treatises are helpful in understanding this topical area of the law. They are:

**A. Statutes**

*See* later sections for discussion and further detail on statutory sources of fiduciary duties. Immediately below is a short summary of sections relevant to this topic that create a duty or provide a remedy:

(1) ERISA Fiduciaries - 29 U.S.C.A., § 1001-1461;
(2) Guardian - Tex. Prob. Code § 761(a)(6) and (b), 761(c)(1) and (4), 668(2);
(4) Next Friend – Tex. R. Civ. P. 44;
(5) Personal Representatives [temporary, permanent, dependent or independent] – Tex. Prob. Code §§ 222(a)(1)(F) and (2), 222(b)(1), (2) and (4), 241(a)(1) and (2), 245(2);
B. Common Law

Fiduciary duties, as discussed, may arise out of common law. What follows is a brief list of cases and their holdings on various relevant duties that the courts have recognized, to wit:

1. Executors & trustees – executors and trustees owe a fiduciary duty to the beneficiaries of the estate or trust. See Ditta v. Conte, 298 S.W.3d. 187, 191. (Tex.2009) (trustees); see e.g., Montgomery v. Kennedy, 669 S.W.2d 309, 313 (Tex. 1984) (trustee of testamentary trust owed fiduciary duty to life beneficiary); Humane Soc'y v. Austin Nat'l Bank, 531 S.W.2d 574, 577 (Tex. 1975) (as executor of estate, bank owed fiduciary duty to beneficiary).


C. Books, Articles and Treatises

1. Tamar Frankel, _Fiduciary Law_, 71 Calif. L. Rev. 795 (1983);

2. L. Wayne Scott, _Liability of Parents for Conduct of Their Child Under Section 33.01 of the Texas Family Code: Defining the Requisite Standards of ‘Culpability’,_ 20 St. Mary's L.J. 69 (1988);


5. Elizabeth S. Scott and Robert E. Scott, _Parents as Fiduciaries_, 81 Va. L. Rev. 2401 (1995);


IV. MARRIAGE AND EMANCIPATION OF MINORS

A. Marriage of Minors

1. Presumption of Validity

   Every marriage is presumed valid and will be upheld against claims of invalidity “unless a strong reason exists for holding the marriage void or voidable.” Tex. Fam. Code Ann. § 1.101 (West). This presumption is rebuttable upon evidence the minor spouse lacked capacity to marry. Kingery v. Hintz, 124 S.W.3d 875, 876 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

2. Ceremonial Marriage of a Minor

   Chapter 2, Subchapter B of the Texas Family Code addresses the subject of underage applicants for marriage: “Except as otherwise provided by this subchapter or on a showing that a prior marriage has been dissolved, a county clerk may not issue a marriage license if either applicant is under 18 years of age.” Tex. Fam. Code Ann. § 2.101 (West). The Family Code creates several exceptions to this prohibition. The first method is that, a parent may consent to the marriage as evidenced in a written declaration of their consent before the clerk, provided the minor is between ages of 16 and 18. Tex. Fam. Code Ann. § 2.102 (West). The second method for a minor to marry is by petitioning the court in their own name for an order granting

3. Common Law Marriage of a Minor
The party seeking to establish an informal marriage must demonstrate he or she has the legal capacity to marry. Kingery v. Hintz, 124 S.W.3d 875, 877 (Tex. App.—Houston [14th Dist.] 2003, no pet.). “A person under 18 years of age may not: (1) be a party to an informal marriage; or (2) execute a declaration of informal marriage under Section 2.402.” Tex. Fam. Code Ann. § 2.401 (West). This age requirement was added by the Texas Legislature in 1997. Act of May 26, 1997, 75th Leg., R.S., ch. 1362, § 1, 1997 Tex. Gen. Laws 5113. Unlike with ceremonial marriage, there is no statutory provision allowing a minor to obtain consent to enter into an informal marriage. Kingery, 124 S.W.3d at 877.

4. Annulment of Marriage of Minor
The court may annul a marriage of a person between 16 and 18 years of age, if the marriage occurred without parental consent or without a court order as provided by Subchapters B and E, Chapter 2. Tex. Fam. Code Ann. § 6.102 (West).

5. Out of State Marriage of a Minor
Texas will recognize an out-of-state marriage, but the marriage must have been valid under that state’s laws in order to be given full faith and credit. Additionally, the marriage must not run afoul of Texas public policy. In this regard, Texas will not give comity to foreign law that is against “good morals or natural justice” or is “prejudicial to the general interests of [Texas] citizens.” Larchmont Farms, Inc. v. Parra, 941 S.W.2d 781, 783 (Tex. App. Corpus Christi 1997).

Texas should grant comity and recognize the marriage of a minor validly solemnized in another state, even if their requirements for the marriage of a minor are less stringent than those of Texas (and as long as those laws were not so contrary to Texas public policy). See generally Loughran v. Loughran, 292 U.S. 216, 223, 54 S. Ct. 684, 686-87, 78 L. Ed. 1219 (1934) (“Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction). If Texas did refuse to recognize the marriage as an affront to “good morals or natural justice,” as it does for same-sex marriages under the Defense of Marriage Act, the minor would have to return to the state where the marriage occurred to seek a divorce.

Once the minor had relocated to Texas, the law of this state will be applied from that point forward. Tex. Fam. Code Ann. § 1.103 (West).

B. Emancipation of Minors through Marriage
One major consideration an attorney must keep in mind when dealing with married minors in Texas is that, unless otherwise expressly provided by statute or the constitution, “a person, regardless of age, who has been married in accordance with the law of this state has the capacity and power of an adult, including the capacity to contract.” Tex. Fam. Code Ann. § 1.104 (West). This Section will likely affect any analysis being performed as to whether any fiduciary duty is owed by a parent or adult to the minor and, additionally, allows for the creation of fiduciary duties in the minor toward others. An example of this in action would be the creation of a fiduciary duty in the minor spouse toward the management of community property. Southwest Tex. Pathology Assoc. v. Roosth 27 S.W.3d 204, 208 (Tex. App.—San Antonio 2000, pet. dism’d); Osuna v. Quintana, 993 S.W.2d 201, 207 (Tex. App.—Corpus Christi 1999, no pet.). In essence, the minor is emancipated when he or she is validly married in accordance with the laws of Texas. Kingery v. Hintz, 124 S.W.3d 875 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

C. Duration of Emancipation of Minor through Marriage
When a minor’s marriage ends in divorce, the minor retains his or her status as an adult (remains emancipated) and, therefore, does not need permission to enter into a second marriage. See Laird v. Swor, 737 S.W.2d 601, 602-03 (Tex. App.—Beaumont 1987, no writ) (father’s support obligation terminated when his minor daughter married and was not reinstated when she divorced). This is not the case with annulment; when a minor’s marriage is annulled, the minor’s disabilities are reinstated. Fernandez v. Fernandez, 717 S.W.2d 781, 783 (Tex. App.—El Paso 1986, writ dism’d).

V. THE PARENT-CHILD RELATIONSHIP
A. Parent’s Rights and Duties
Title 5 of the Texas Family Code addresses the parent-child relationship and suits affecting it. The relevant Chapter to this article is Chapter 151 – Rights and Duties in Parent-Child Relationship. Section 151.001 is set in full below.

(a) A parent of a child has the following rights and duties:

(1) the right to have physical possession, to direct the moral and religious training, and to designate the residence of the child;
(2) the duty of care, control, protection, and reasonable discipline of the child;
(3) the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education;
(4) the duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including the right as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;
(5) except as provided by Section 264.0111, the right to the services and earnings of the child;
(6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment;
(7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
(8) the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;
(9) the right to inherit from and through the child;
(10) the right to make decisions concerning the child's education; and
(11) any other right or duty existing between a parent and child by virtue of law.

(b) The duty of a parent to support his or her child exists while the child is an unemancipated minor and continues as long as the child is fully enrolled in a secondary school in a program leading toward a high school diploma and complies with attendance requirements described by Section 154.002(a)(2).
(c) A parent who fails to discharge the duty of support is liable to a person who provides necessaries to those to whom support is owed.
(d) The rights and duties of a parent are subject to:
   (1) a court order affecting the rights and duties;
   (2) an affidavit of relinquishment of parental rights; and
   (3) an affidavit by the parent designating another person or agency to act as managing conservator.

(e) Only the following persons may use corporal punishment for the reasonable discipline of a child:
   (1) a parent or grandparent of the child;
   (2) a stepparent of the child who has the duty of control and reasonable discipline of the child; and
   (3) an individual who is a guardian of the child and who has the duty of control and reasonable discipline of the child.


B. Child’s Rights and Duties

Minor children have the rights, generally, to support from their parent or guardian, Id., and the right of a beneficiary against waste of assets under their name by a parent, guardian, or custodian. In re M.D.C., 171 S.W.3d 361 (Tex. App.—Dallas 2005, no pet.). Minors typically do not have duties toward their parents or third parties, with several exceptions. One exception, outside the scope of this article, is the obligations and responsibilities placed on minors under the penal code. See generally Tex. Fam. Code Ann. § 54.02 (West) (waiver of jurisdiction by juvenile court and discretionary transfer to criminal court); Tex. Pen. Code Ann. § 8.07 (West) (age affecting criminal responsibility). Another exception, which would be rare to encounter but easy to overlook, is the married minor.

C. Adoptive Parents

An order of adoption creates a parent-child relationship between the adoptive parent and the child “for all purposes.” Tex. Fam. Code Ann. § 162.017(a) (West). This includes the child’s right to inherit from and through his or her adoptive parents. Id. at (b). Adoption, however, does not “preclude or affect” the rights of a biological or adoptive maternal or paternal grandparent to reasonable possession of or access to a grandchild. Id. at (d).

D. Rights of Extended Relatives

If both of the parents of a child are deceased, another relative may sue for appointment as a managing conservator. Tex. Fam. Code Ann. § 153.431 (West). A biological or adoptive grandparent may request possession or access by either filing an original suit or a suit for modification under Chapter 156. Id. at § 153.432. Tex. Fam. Code § 153.433 lists
the requirements for a court to order a grandparent access or possession.

The bar for non-parent access or possession when one or both parents are alive is very high, a result of the United States Supreme Court’s ruling that the decisions of a fit parent’s right to make care, custody, and control decisions regarding their children was a “liberty interest” protected by the Due Process Clause of the Fourteenth Amendment to the Constitution. 

It is important to note that the Barlow court did not use the word “liberty interest” in its opinion, but rather referred to the right to make decisions about the upbringing of a child as a “liberty interest” protected by the Due Process Clause of the Fourteenth Amendment to the Constitution. 

This duty exists from the moment a parent, by his own volition, becomes a parent and is superior to the personal aspirations or ambitions of the parent. Cordell v. Cordell, 592 S.W.2d 84, 86 (Tex. 1979) (father’s legal duty to support his child is superior to his educational and professional aspiration of becoming a dentist).

The duty to support is statutorily created (see above) and is enforced by the courts. There is no need to prove breach of a fiduciary duty, merely that either a prior support order has not been complied with or that the parent has failed to provide for the necessities of life for his or her child. See Daniels v. Allen, 811 S.W.2d 278, 280 (Tex. App.—Tyler 1991, no writ) (citing Creavin v. Maloney, 773 S.W.2d 698, 702–703 (Tex.App.—Corpus Christi 1989, writ denied); Tex. Fam. Code Ann. § 151.001(a)(2) (West)).

Failure to support is sanctionable by criminal and civil contempt. Tex. Fam. Code Ann. § 157.001 (West). See Appendix 1. “An order of support, to be enforceable by contempt, must be based upon statutory authority.” 40 Tex. Jur. 3d Family Law § 1549 (citing Ex parte Hall, 854 S.W.2d 656 (Tex. 1993)). The judgment “must set out the terms for compliance in clear and unambiguous terms. Roosth v. Roosth, 889 S.W.2d 445, 452 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citing Ex Parte Brister, 801 S.W.2d 833, 834 (Tex.1990)). The judgment must also clearly order the party to perform the required acts. Roosth v. Roosth, 889 S.W.2d at 452 (citing Ex Parte Brister, 801 S.W.2d at 834).

VI. LIABILITY OF PARTIES

A. Liability of Parents to Children

1. Duty to Support

A parent has a duty to “support the child, including providing the child with clothing, food, shelter, medical and dental care, and education” and the duty of “care, control, protection, and reasonable discipline of the child.” Tex. Fam. Code Ann. § 151.001(a)(2) & (3) (West); R.W. v. Texas Dept. of Protective & Regulatory Services, 944 S.W.2d 437, 440 (Tex. App.—Houston [14th Dist.] 1997, no writ). This duty exists from the moment a parent, by his actions, recognizes a child as his own, even when not ordered by the trial court to do so. R.W. v. Texas Dept. of Protective & Regulatory Services, 944 S.W.2d at 440; Curton v. Gordon, 510 S.W.2d 682 (Tex. Civ. App.—Austin 1974, writ ref’d n.r.e.).

This duty to supply necessities to one’s children applies “both before and after divorce.” Cordell v.
was negligent in supervising child when parent left loaded gun in the room); Hall v. Martin, 851 S.W.2d 905, 910 (Tex. App.—Beaumont 1993, writ denied) (parental immunity applied to claim that parent was negligent in entrusting a motor scooter to child without instructions or helmet); Shoemake v. Fogel, Ltd., 826 S.W.2d 933, 938 (Tex.1992) (parental immunity applied to claim for negligent supervision of child who drowned).

Certain situations do not amount to an exercise of parental authority or discretion, Texas courts have specifically held that the doctrine does not apply (1) when a parent commits a willful, malicious, or intentional wrong against a child or abandons or abdicates his parental responsibility, (2) when the act complained of arises outside of a normal family relationship of a parent to a child, such as a business activity in which the child is the employee and the parent is the employer, and (3) when damages are caused to the child by the parent's negligently operating a motor vehicle. McCullough, 214 S.W.3d at 801; see Reynolds, 127 S.W.3d at 41; Hall, 851 S.W.2d at 909.

The elements of the parental immunity affirmative defense, which serves to bar tort claims brought against parents by their unemancipated minor children, are:

1. The injured party is an unemancipated minor;
2. The defendant is the minor's parent;
3. The minor's alleged injury is a personal injury;
4. The claim is based on the defendant's alleged negligence; and
5. The minor's alleged injury arises from the defendant's reasonable exercise of parental authority, such as disciplining or supervising a child, or the parent's exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child that the parent was required to provide.

Parents can be liable as a fiduciary for waste of a child’s assets, but the plaintiff must establish there was a fiduciary duty in existence beyond the standard parent-child relationship outlined elsewhere in this article (i.e., there must be some fiduciary obligation to manage an asset for the benefit of the child) and there must be evidence to support a finding finding.

In Rodriguez v. Rodriguez, the court affirmed the trial court’s ruling ordering reimbursement from the mother to the son for violating her fiduciary duty as constructive trustee by failing to set up a separate savings account in trust for her child, depositing rental income from an asset held in constructive trust into her personal account instead of the separate trust account, failing to account, encumbering an asset held in constructive trust for personal benefit, and selling an asset to be held in constructive trust trust for her son. Rodriguez v. Rodriguez, 04-07-00252-CV, 2007 WL 3272133 (Tex. App.—San Antonio Nov. 7, 2007) (mem. op.).

The attorney prosecuting a claim for breach of a fiduciary duty, or requesting the creation of a constructive or resulting trust, should be careful to make sure the court enters into the record the trust agreement or includes in its decree all necessary language. In In re M.D.C., a judgment for children against their mother was overturned due to their failure to establish that the mother breached her fiduciary duty by wasting trust and partnership assets by failing to make part of the record the trust instrument and partnership agreement mother. In re M.D.C., 171 S.W.3d 361 (Tex. App.—Dallas 2005, no pet.).


B. Liability of Parents for the Conduct of Their Children
1. Generally

At common law, “the parent is generally not liable for the tortious acts of a minor child. L. Wayne Scott, Liability of Parents for Conduct of Their Child Under Section 33.01 of the Texas Family Code: Defining the Requisite Standards of "Culpability", 20 St. Mary's L.J. 69, 70 (1988). Exceptions to this general rule exist, and the parent may be held liable if:

1. The child is an agent of the parent;
2. The parent negligently intrusts a dangerous instrumentality to the child;
3. The parent ratifies the conduct of the child by acceptance or consent;
4. The parent directs the child in the commission of the tort;
(5) the tort is committed in the scope of duties the parent imposes on the child.

Id. In Texas, common law “only imposed liability on a parent for the tort of a child when:

(1) a master/servant relationship existed between the parent and child; \textit{Aetna Ins. Co. v. Richardelle}, 528 S.W.2d 280, 285 (Tex. Civ. App.—Corpus Christi 1975, writ ref’d n.r.e.);
(2) the parent had directed the child in the commission of the tortious act; \textit{Id.};
(3) the parent had negligently permitted this child to engage in conduct likely to harm another; \textit{Id.}.

Further, the usual exceptions to the general rule of no parental liability found in other states can be found in Texas. \textit{See, e.g., Amarillo Nat’l Bank v. Terry}, 658 S.W.2d 702, 704 (Tex. App.—Amarillo 1983, no writ) (parents liable for sons conduct only if willful and malicious); \textit{Moody v. Clark}, 266 S.W.2d 907, 912 (Tex. Civ. App.—Texarkana 1957, writ ref’d n.r.e.) (parent liable when own negligence proximately causes injury). Such negligence is shown when the parent entrusts the child with a dangerous instrumentality, or carelessly fails to restrain a child when he knows he has dangerous tendencies. \textit{See id. But see Lessoff v. Gordon}, 58 Tex. Civ. App. 213, 215, 124 S.W. 182, 183 (Tex. Civ. App. 1909, no writ) (parent liable for torts of child committed without parent’s knowledge, consent or participation).”

20 St. Mary’s L.J. at 75.

2. Harm to Property

The Texas Family Code states a parent or other person who “has the duty of control and reasonable discipline of a child is liable for any property damage proximately caused by:

(1) the negligent conduct of the child if the conduct is reasonably attributable to the negligent failure of the parent or other person to exercise that duty; or
(2) the wilful and malicious conduct of a child who is at least 10 years of age but under 18 years of age.”

\textit{Tex. Fam. Code Ann. § 41.001 (West).}

“Texas and California have the highest recovery limit among the states.” Eve M. Brank, Stephanie C. Kucera, and Stephanie A. Hays, \textit{Parental Responsibility Statutes: An Organization and Policy Implications}, 7 J. L. Fam. Stud. 1, 6 (2005). Damages in Texas that fall under Tex. Fam. Code § 41.001 are limited to actual damages, not to exceed $25,000 per occurrence, plus court costs and reasonable attorney’s fees. Tex. Fam. Code Ann. § 41.002 (West). Tex. Fam. Code Ann. § 41.0025 applies the above rules to liability for property damage to an inn or hotel, with the $25,000 per occurrence cap being defined in Subsection (b) as “one incident on a single day in one hotel room” which “does not include incidents in separate rooms or incidents that occur on different days.”

The purpose of the parental liability provisions of Chapter 41 is to protect and compensate property owners from the willful and malicious destruction of their property by minors. \textit{Buie v. Longspaugh}, 598 S.W.2d 673 (Tex. Civ. App.—Fort Worth 1980, writ ref’d n.r.e.). The sections authorizing courts to impose restitution on parents of delinquent children and placing the burden on parents to prove their good faith efforts to prevent delinquent behavior as a defense to liability do not allow for arbitrary and discriminatory application, violate due process, or deprive parents of a reasonable opportunity to prepare a meaningful defense. \textit{In re D.M.}, 191 S.W.3d 381 (Tex. App.—Austin 2006, pet. denied).

3. Harm to Persons

Parental liability for the torts of a child committed toward another is difficult to establish. \textit{See Childers v. A.S.}, 909 S.W.2d 282 (Tex. App.—Fort Worth 1995, no writ) (parents of minor child who made inappropriate sexual contact with friend who was also a minor were not liable to friend or friend’s parents for negligence or intentional tort, as they owed no duty to them). “The mere fact of paternity or maternity does not make a parent liable to third parties for the torts of his or her minor child.” \textit{Rodriguez v. Spencer}, 902 S.W.2d 37, 42 (Tex. App.—Houston [1st Dist.] 1995, no writ).

The 1st District Court of Appeals discussed parental liability for the tortious conduct of children in depth in \textit{Rodriguez v. Spencer}, 902 S.W.2d 37 (Tex. App.—Houston [1st Dist.] 1995, no writ). The Court of Appeals in \textit{Rodriguez v. Spencer}, 902 S.W.2d at 43, refused to adopt Restatement (Second) of Torts § 316 (1965), which states:

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to
create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

Some of the salient points made by the court were:

a. The statute providing that a parent has a duty of “care, control, protection, and reasonable discipline” of a child did not create a duty on the parent to protect third parties from actions by the child; the provision is limited to the parent-child relationship. Tex. Fam. Code § 12.04(2) [now § 151.001];

b. The mere fact of paternity or maternity does not make a parent liable to third parties for the torts of his or her minor child; generally, minors are civilly liable for their own torts;

c. A parent is protected from liability to a child arising from torts of the child by the doctrine of parental immunity;

d. A parent may be vicariously liable for a minor’s torts under respondeat superior or joint enterprise or when the parent negligently permits a child to act in manner likely to cause injury to another; thus, negligence may be shown where a parent entrusts a child with a dangerous instrumentality or carelessly fails to restrain a child known to have dangerous tendencies;

e. Parental anticipation of danger is an element necessary to establish parental liability for a child’s tortious conduct against a third party;

f. The basis of a parent’s duty to protect third persons from a child’s actions is the parent’s knowledge, consent, sanction, or participation in the child’s activities; actual knowledge is not required if the parent should, under the circumstances, reasonably anticipate consequences of parent’s actions;

g. A parent’s duty to protect third parties from the acts of the parent’s minor children depends on whether the injury to the third party is reasonably foreseeable under the circumstances as evidenced by the parent’s knowledge, consent, sanction, or participation in the child’s activities; in determining existence of this third-party parental duty, the court may also consider the risk to others and the likelihood of injury weighed against the social utility of parent’s conduct, magnitude of burden of guarding against injury, and consequences of placing that burden on the parent.

The requirements of Rodriguez, particularly the foreseeability requirement, creates a high bar for the plaintiff to overcome in holding a parent liable for injury caused by their child. In Newkumet v. Allen, 230 S.W.3d 518 (Tex. App.—Eastland 2007, no pet.), the parents of a 13-year-old girl who caused an accident while operating a jet boat that her parents owned could not have been liable for negligent entrustment and could not have been liable for negligent supervision of daughter, absent evidence that parents should have foreseen daughter’s conduct. Absent evidence indicating the parents knew she did not operate the boat in a safe manner or was a danger to others, the parents could not be held liable. Id. Another example of how difficult it is to hold a parent liable for their child’s conduct is Prather v. Brandt, 981 S.W.2d 801 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). In that case, the Court held that a father was not negligent in entrusting a shotgun to his teenage son, which was later used in a drive by shooting, where there was no evidence produced that the father knew or should have known his son was incompetent, reckless, or otherwise likely to act negligently with the gun.

In summary, a parent may be held liable for a child’s torts if the parent negligently allows his or her child to act in a manner likely to harm another, if the parent gives the child a dangerous instrumentality, or if the parent does not restrain a child known to have dangerous tendencies. Newkumet, 230 S.W.3d 518; Rodriguez, 902 S.W.2d 37. There must be a duty on the parent to protect third parties from their child’s behavior to be negligent; this duty depends on whether the injury was foreseeable, which is evaluated by looking at the parent’s knowledge of, consent to, or participation in the child’s activity. Newkumet, 230 S.W.3d 518; Rodriguez, 902 S.W.2d 37. See Appendix 2 for a form pleading for negligent failure to control a child.

If the parents are found liable, the panoply of damages proximately caused by the torts of a child is the same as in any other tort case. Generally, exemplary damages will be extremely difficult to prove, as they can be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from fraud, malice, or gross negligence.Tex. Civ. Prac. & Rem Code Ann. § 41.003(a). See Appendices 3-6 for pattern jury charges on breach of a fiduciary duty, actual damages for breach, and removal of limitations on exemplary damages.

C. Liability of Child to Others

“As a general rule, minors are civilly liable for their own torts.” Childers v. A.S., 909 S.W.2d 282, 292 (Tex. App.—Fort Worth 1995, no writ) (citing Rodriguez v. Spencer, 902 S.W.2d 37, 42 (Tex. App.—Hous. [1st Dist.] 1995, no writ) (citing Williams v. Lavender, 797 S.W.2d 410, 412 (Tex.App.—Fort Worth 1990, writ denied) (minor liable for assault of
another minor) and Brown v. Dellinger, 355 S.W.2d 742, 746 (Tex.Civ.App.—Texarkana 1962, writ ref'd n.r.e.) (suit against minors for trespass)); Prather v. Brandt, 981 S.W.2d 801, 806 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (citing Rodriguez, 902 S.W.2d at 42). Civil courts will look to the Texas Penal Code for the elements of civil causes of action against minors. Childers, 909 S.W.2d at 292. As such, minors can be held to account for their intentional torts. Id.

D. Limitations

“A person must bring suit on the following actions not later than four years after the day the cause of action” for breach of a fiduciary duty accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(5) (West). A fiduciary's misconduct to be inherently undeiscoverable. Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988) (attorney); Slay v. Burnett Trust, 143 Tex. 621, 652, 187 S.W.2d 377, 394 (1945) (trustee). If the plaintiff is unaware of the breach due to fraudulent concealment of the breach, the running of limitations is tolled until the fraud is discovered or could have been discovered with reasonable diligence. BP America Production Co. v. Marshall, 342 S.W.3d 59 (Tex. 2011); Kerlin v. Sauceda, 263 S.W.3d 920 (Tex. 2008); Slay, 187 S.W.2d at 394 (trustee); S.V. v. R.V., 933 S.W.2d 1, 5-9 (Tex. 1996). See S.V. v. R.V., 933 S.W.2d 1, for an excellent and exhaustive discussion of limitations, minors, and the application of the “discovery rule” in actions involving minors.

VII. FIDUCIARY DUTIES OF COURT APPOINTEES IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP (SAPCR)

A. Introduction

Generally, a fiduciary duty arises as a matter of law in formal attorney-client and trustee relationships. See Meyer v. Cathey, 167 S.W.3d 327, 330 (Tex.2005). The court may appoint, or may need to appoint, an amicus attorney, an attorney ad litem, or a guardian ad litem depending on whether the best interests of a child is involved in a suit and those interests are not adequately represented by a party to the suit whose interests are not in conflict. Tex. Fam. Code Ann. § 107.021 (West); § 107.011 (mandatory appointment of guardian ad litem); § 107.012 (mandatory appointment of attorney ad litem). The question then is, who is a fiduciary duty owed to and to whom is the attorney liable? This Section will discuss the responsibilities and duties owed by attorneys and experts appointed in family law cases.

B. Attorney Ad Litem

1. Role of the Attorney Ad Litem

The Family Code defines an attorney ad litem as “an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.” Tex. Fam. Code Ann. § 107.001 (West). In essence, an attorney ad litem is the child’s counsel and must advocate for his or her client as the client wishes. See Tex. Fam. Code § 107.003 for a partial listing of some of the duties of an attorney ad litem.

An attorney ad litem must be appointed in a suit filed by a governmental entity seeking to terminate the parent-child relationship or to be named conservator. Tex. Fam. Code Ann. § 107.012 (West). An attorney may be appointed in a dual role as both attorney ad litem and guardian ad litem under Tex. Fam. Code § 107.0125, but this can cause a conflict for the attorney if what the child wants differs from what is in the child’s best interest. If this occurs, § 107.0125(c) allows the attorney to request the court to appoint another person to serve as guardian ad litem for the child; the court may also do this at any point during the suit sua sponte under § 107.0125(b).

2. The Attorney Ad Litem’s Fees

An attorney appointed under Chapter 107, Subchapters A and B, of the Texas Family Code, see Tex. Fam. Code §§ 107.001-107.023, serves as an attorney ad litem for a child, an attorney in the dual role, or an attorney ad litem for a parent “is entitled to reasonable fees and expenses in the amount set by the court to be paid by the parents of the child unless the parents are indigent.” Tex. Fam. Code Ann. § 107.015(a) (West). These expenses can be taxed as costs to one or more parties before the court. Id. at (b); Moore v. Moore, 898 S.W.2d 355 (Tex. App.—San Antonio 1995, no writ). If indigency is shown, the costs can also be allocated to the county. Tex. Fam. Code Ann. § 107.015(c) (West).

A deposit should be ordered by the court when the appointment is made, and another deposit in trust should be made prior to the final hearing. Tex. Fam. Code § 107.023(b) (West). See the Section immediately following this for a discussion on reasonableness of the fee.

C. Guardian Ad Litem

1. Role of the Guardian Ad Litem

A guardian ad litem acts as an officer and advisor of the court whose task is to ascertain whether the party’s guardian or next friend has an adverse interest to the party and to advise the court, in a limited capacity, what is in the party’s best interest. Tex. R. Civ. P. 173.4. Once appointed, the guardian ad litem
displaces the next friend and becomes the personal representative of the minor in the lawsuit. *City of Houston v. Woods*, 138 S.W.3d 574, 579 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Byrd v. Woodruff*, 891 S.W.2d 689, 705 (Tex. App.—Dallas 1994, writ dism’d by agr.).

A guardian ad litem must be appointed in a suit filed by a governmental entity seeking termination of a parent-child relationship or the appointment of a conservator for a child. *Tex. Fam. Code Ann.* § 107.011 (West). The guardian ad litem must be appointed after the filing of the petition, but before a full adversary hearing. *Id.*

With respect to minors, a guardian ad litem is required to participate in the case only to the extent necessary to protect the minor’s interest and should not duplicate the work performed by the plaintiff’s attorney. *Land Rover U.K., Ltd. v. Hinojosa*, 210 S.W.3d 604 (Tex. 2006). A guardian ad litem is not an attorney for the child but an officer appointed by the court to assist in protecting the child’s interests when a conflict of interest arises between the child and the child’s guardian or next friend. *Id.; Dawson v. Garcia*, 666 S.W.2d 254 (Tex. App.—Dallas 1984, no writ); *Pleasant Hills Children’s Home of the Assemblies of God, Inc. v. Nida*, 596 S.W.2d 947 (Tex. Civ. App.—Fort Worth 1980, no writ). In short, the guardian ad litem is not the child’s attorney, but an officer appointed by the court to assist in properly protecting the child’s interest. *Woods, 138 S.W. 3d 579; Jocson v. Crabb, 133 S.W.3d 268, 271 (Tex.2004); American Gen. Fire & Cas. Co. v. Vandewater, 907 S.W.2d 491, 493 n. 2 (Tex.1995).*

A guardian ad litem must act as a fiduciary with respect to the child’s interests and, as a fiduciary, owe the child a duty of integrity, loyalty, and utmost good faith. *Grunewald v. Technibilt Corp.*, 931 S.W.2d 593, 597 (Tex. App.—Dallas 1996, writ denied) (citing *Byrd v. Woodruff*, 891 S.W.2d 689, 706 (Tex. App.—Dallas 1994, writ dism’d by agr.).

2. **The Guardian Ad Litem’s Fee**

An appointed guardian ad litem may request a reasonable fee for his or her services, the amount of which is left to the trial court’s discretion and will not be overruled absent evidence that the trial court abused its discretion. *Hinojosa*, 210 S.W.3d at 607; *Tex. Fam. Code § 107.023 (West); Tex. R. Civ. P. 173.6. A deposit should be ordered by the court at the time of the appointment, and another deposit in trust should be made prior to the final hearing. *Tex. Fam. Code § 107.023(b) (West). Factors used to determine reasonableness of the attorney’s fees include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

*Hinojosa*, 210 S.W.3d at 607 (citing *Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex.1999); *Arthur Andersen v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex.1997)).

“A reasonable hourly rate multiplied by the number of hours spent performing necessary services within the guardian ad litem’s role yields a reasonable fee.” *Hinojosa*, 210 S.W.2d at 608; see *Garcia*, 988 S.W.2d at 222. Additional sums are “rarely appropriate, particularly since the guardian ad litem serves, in part, as an advisor to the court and will enjoy the protection of qualified judicial immunity.” *Hinojosa*, 210 S.W.3d at 608.

**D. Amicus Attorney**

1. **Role of the Amicus Attorney**

In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity, the court may appoint an amicus attorney. *Tex. Fam. Code Ann.* § 107.021 (West). An amicus attorney must:

A guardians ad litem is not the child’s attorney, but an officer appointed by the court to assist in properly protecting the child’s interests when a conflict of interest arises between the child and the child’s guardian or next friend. *Id.; Dawson v. Garcia*, 666 S.W.2d 254 (Tex. App.—Dallas 1984, no writ); *Pleasant Hills Children’s Home of the Assemblies of God, Inc. v. Nida*, 596 S.W.2d 947 (Tex. Civ. App.—Fort Worth 1980, no writ). In short, the guardian ad litem is not the child’s attorney, but an officer appointed by the court to assist in properly protecting the child’s interest. *Woods, 138 S.W. 3d 579; Jocson v. Crabb, 133 S.W.3d 268, 271 (Tex.2004); American Gen. Fire & Cas. Co. v. Vandewater, 907 S.W.2d 491, 493 n. 2 (Tex.1995).*

2. **The Guardian Ad Litem’s Fee**

An appointed guardian ad litem may request a reasonable fee for his or her services, the amount of which is left to the trial court’s discretion and will not be overruled absent evidence that the trial court abused its discretion. *Hinojosa*, 210 S.W.3d at 607; *Tex. Fam. Code § 107.023 (West); *Tex. R. Civ. P. 173.6. A deposit should be ordered by the court at the time of the appointment, and another deposit in trust should be made prior to the final hearing. *Tex. Fam. Code § 107.023(b) (West). Factors used to determine reasonableness of the attorney’s fees include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and

the skill required to perform the legal service properly; (2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

*Hinojosa*, 210 S.W.3d at 607 (citing *Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex.1999); *Arthur Andersen v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex.1997)).

“A reasonable hourly rate multiplied by the number of hours spent performing necessary services within the guardian ad litem’s role yields a reasonable fee.” *Hinojosa*, 210 S.W.2d at 608; see *Garcia*, 988 S.W.2d at 222. Additional sums are “rarely appropriate, particularly since the guardian ad litem serves, in part, as an advisor to the court and will enjoy the protection of qualified judicial immunity.” *Hinojosa*, 210 S.W.3d at 608.

**D. Amicus Attorney**

1. **Role of the Amicus Attorney**

In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity, the court may appoint an amicus attorney. *Tex. Fam. Code Ann.* § 107.021 (West); § 107.017 (the statute governing such appointments, and the amicus attorney owes a duty of competent representation (duty of care) to the child, not to the parents. *Id.; Zeifman v. Nowlin*, 322 S.W.3d 804, 808-09 (Tex. App.—Austin 2010, no pet.).

An amicus attorney must:
(1) seek to elicit in a developmentally appropriate manner the child's expressed objectives of representation;
(2) with the consent of the child, ensure that the child's expressed objectives of representation are made known to the court;
(3) consider the impact on the child in formulating the amicus attorney's presentation of the child's expressed objectives of representation to the court;
(4) review and sign, or decline to sign, an agreed order affecting the child;
(5) explain the basis for the amicus attorney's opposition to the agreed order if the amicus attorney does not agree to the terms of a proposed order;
(6) explain the role of the amicus attorney to the child; and
(7) inform the child that the amicus attorney may use information that the child provides in providing assistance to the court.


2. The Amicus Attorney’s Fee

“In a suit other than a suit filed by a governmental entity requesting termination of the parent-child relationship or appointment of the entity as conservator of the child, in addition to the attorney's fees that may be awarded under Chapter 106,” an amicus attorney is entitled to reasonable fees and expenses in an amount set by the court and ordered to be paid by one or more parties to the suit. Tex. Fam. Code Ann. § 107.023(a) (West). A deposit should be ordered by the court when the appointment is made, and another deposit in trust shall be made prior to the final hearing. Tex. Fam. Code § 107.023(b) (West). See the Section immediately above this for a discussion on reasonableness of the fee.

E. Derived Judicial Immunity

1. Court Appointed Attorneys

Judges are absolutely immune from liability for judicial acts that are not performed in clear absence of all jurisdiction, no matter how erroneous the act or how evil the motive. Delcourt v. Silverman, 919 S.W.2d 777, 781 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Judicial immunity protects not only the individual judges, but benefits the public “whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.” Id. (citing Bradley v. Fisher, 80 U.S. (13 Wall) 335, 350, 20 L.Ed. 646 (1871) (citations omitted)). This protection extends to officers of the court who are integral parts of the judicial process and to appointees of the court to whom judges delegate their authority or request to perform services. Delcourt, 919 S.W.2d at 781 (citing Byrd v. Woodruff, 891 S.W.2d 689, 707 (Tex.App.—Dallas 1994, writ denied). This absolute immunity is referred to as “derived judicial immunity.” Delcourt, 919 S.W.2d at 781 (citing Clements v. Barnes, 834 S.W.2d 45, 46 (Tex. 1992)).

Under a “functional” approach to derived judicial immunity, a party is entitled to immunity when the party is “acting as an integral part of the judicial system or an ‘arm of the court.’” Delcourt v. Silverman, 919 S.W.2d 777, 782 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (citing Briscoe v. LaHue, 460 U.S. 325, 335, 103 S.Ct. 1108, 1115, 75 L.Ed.2d 96 (1983)).

A guardian ad litem, an attorney ad litem, or an amicus attorney appointed under this chapter is not liable for civil damages arising from an action taken, a recommendation made, or an opinion given in the capacity of guardian ad litem, attorney ad litem, or amicus attorney.

Tex. Fam. Code Ann. § 107.009(a) (West). The statutory immunity does not apply to an action taken, recommendation made, or opinion given (1) with conscious indifference or reckless disregard to the safety of another; (2) in bad faith or with malice; or (3) that is grossly negligent or willfully wrongful. Id. § 107.009(b); Zeifman, 322 S.W.3d at 807. There is no exception to this statutory immunity for a claim that the amicus attorney committed fraud with respect to one of the parents of a child the attorney is assisting. Zeifman, 322 S.W.3d at 807.

Once the attorney conclusively establishes the affirmative defense of statutory immunity, the burden of production shifts to the plaintiff to present evidence sufficient to create a fact issue on at least one element of either the affirmative defense or an exception to the affirmative defense. Id.

2. Mental Health Expert (Psychologist or Psychiatrist)

A psychologist or psychiatrist or psychologist who is appointed by the court is entitled to derived judicial immunity if he or she is appointed to fulfill quasi-judicial functions intimately related to the judicial process. Delcourt, 919 S.W.2d at 782. Numerous courts have extended derived judicial
immunity to psychiatrists and other mental health experts assisting the court in criminal cases. *Id.* The 14th Court of Appeals extended the reasoning of those criminal cases, that the psychiatrist or mental health professional performed a special task closely related to the judicial process pursuant to a court directive, to mental health experts providing psychosocial expertise in child custody suits. *Id.* at 782-83. The court went on to state:

> When a court appoints a mental health professional to examine the child and the parents in a custody proceeding, the professional is acting as a fact finder for the court. The court relies on the professional to provide information essential to the decision-making process. Without the protection of absolute immunity, such professionals would be, at the very least, reluctant to accept these appointments. This would in turn inhibit judges from performing their duties.  

*Id.* at 783.

### IV. STATUTES – OTHER CODES & RULES CREATING FIDUCIARY DUTIES TO CHILDREN


An ERISA plan can be attached to for the purposes of family support, including the support of a child. An order providing for this must be a qualified domestic relations order (QDRO). See 29 U.S.C.A. § 1056 (West). If a child were named the alternate payee on the plan, it is possible a court could find for a constructive trust and hold any fiduciary who wasted assets liable to the minor.

#### B. Guardian and Ward [Tex. Prob. Code §§ 761(a)(6), 761(c)(1) and (4), 668(2)]

“A guardian is a statutory officer appointed by the Probate Court to guard the interest of his ward and provide for his education and maintenance.” *Decker v. Wiggins*, 421 S.W.2d 189, 192 (Tex. Civ. App.—Fort Worth 1967, no writ) (citing *Dallas Trust & Sav. Bank v. Pitchford*, 208 S.W. 724, 724 (Tex. Civ. App.—Dallas 1919, no writ)). Depending on the scope of powers granted to the guardian over the ward, this can very much resemble the duties and rights that arise under the law in parent-child relationships.

Unlike a guardian ad litem, a guardian under the probate code is not entitled to derived judicial immunity. *Edwards v. Pena*, 38 S.W.3d 191, 196 (Tex. App.—Corpus Christi 2001, no pet.). As mentioned, particularly when dealing with minors, these cases tend to look like suits between the parent and child. “A guardian takes possession of a ward’s property and manages the estate of the ward as a prudent person would manage their own property.” *Id.*; *Tex. Prob. Code Ann.* § 768 (West). The probate code specifically states that a guardian may be held liable for failing to exercise due diligence in collecting all claims and debts due the ward and recovering possession of the ward’s property. *Tex. Prob. Code Ann.* § 772 (West); *Edwards*, 38 S.W.3d at 196.

A guardian is charged with the duty to properly and prudently manage and control the ward and her estate and has a fiduciary duty to maintain and preserve the assets of that estate. *Byrd*, 891 S.W.2d at 706; *Tex. Prob. Code Ann.* § 110(g) (West). Guardians owe a fiduciary duty to wards and may be held liable if they breach that duty. *Edwards*, 38 S.W.3d at 196 (citing *Byrd v. Woodruff*, 891 S.W.2d 689, 706 (Tex. App.—Dallas 1994, writ dism’d by agr.). In short, a guardian of the estate has a fiduciary duty akin to a parent who is the fiduciary of funds held in trust for their child, to prudently manage the funds for the ward’s/child’s benefit.

### C. Next Friends [Tex. R. Civ. P. 44]

Minors, lunatics, idiots, or persons non compos mentis who have no legal guardian may sue and be represented by “next friend.” Tex. R. Civ. P. 44. A next friend “shall have the same rights concerning such suits as guardians have, but shall give security for costs, or affidavits in lieu thereof, when required.” *Id.* As such, a next friend in a suit bears the same responsibilities as a guardian, discussed above.

In family cases, a next friend will usually be the next adult relative who is not disqualified due to a conflicting interest or for lack of capacity. Generally, “anyone who will undertake the office may be the next friend of a party and may maintain the suit in that capacity, if it appears to the court to be for the benefit of that party.” 57 Tex. Jur. 3d Parties § 22. Any adult with capacity may sue as a next friend of a minor, so long as it is in the minor’s best interest. *Id.* (citing *Gordy v. Alexander*, 550 S.W.2d 146 (Tex. Civ. App.—Amarillo 1977, writ ref’d n.r.e.). This includes mothers and fathers. *Fall v. Weber*, 47 S.W.2d 365 (Tex. Civ. App.—Dallas 1932, writ ref’d) (father as next friend); *Britt v. Luce*, 114 S.W.2d 267 (Tex. Civ. App.—Beaumont 1938, no writ) (mother as next friend).

Any final settlement made by the next friend may not be collaterally attacked by the minor later, provided that the parent’s interest is not preferred to the detriment of the minor. 57 Tex. Jur. 3d Parties § 22 (citing *Woodfin v. Coleman*, 931 S.W.2d 383 (Tex. App.—Austin 1996, writ denied). The same applies to settlements approved by guardians ad litem. See *Grunewald v. Technibilt Corp.*, 931 S.W.2d 593 (Tex. App.—Dallas 1996, writ denied) (parents lacked
standing as next friends of child to appeal trial court's approval of settlement recommendation by guardian ad litem who represented child in products liability action brought on behalf of child against manufacturer of product that injured child).

Should a conflict of interest arise between the minor and next friend, the appointment of a guardian ad litem is within the court's authority and is often necessary.  

Byrd, 891 S.W.2d at 706. Once appointed, the guardian ad litem displaces the next friend and becomes the personal representative of the individual subject to a legal disability (i.e., unemancipated minors).  


D. Trustees [Tex. Prop. Code §§ 114.001-114.008]

“A trustee owes the trust beneficiary an unwavering duty of good faith, fair dealing, loyalty, and fidelity over the trust's affairs and its corpus.”  

72 Tex. Jur. 3d Trusts § 65 (citing Herschbach v. City of Corpus Christi, 883 S.W.2d 720 (Tex. App.—Corpus Christi 1994, writ denied). A trustee is accountable to a beneficiary for the trust property and must account for the corpus and any income or profit made from the corpus.  


The Uniform Prudent Investor Act, effective January 1, 2004, requires that a trustee:

- invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee must exercise reasonable care, skill and caution.

72 Tex. Jur. 3d Trusts § 65; Tex. Prop. Code Ann. § 117.0004(a) (West). Decisions on how to administer the trust’s assets must be made by considering the portfolio in total, keeping in mind the objective of the trust and diversifying or investing as necessary to meet the trust’s objectives.  


The trustee is a fiduciary to the beneficiaries of the trust, and negligent administration of the trust is a breach of his or her fiduciary duty.  

Dickson v. Dickson, 544 S.W.2d 200 (Tex. Civ. App.—Austin 1976, writ dism'd w.o.j.); Jewett v. Capital Nat. Bank of Austin, 618 S.W.2d 109 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.). Self-dealing is a violation of the trustee’s fiduciary duties and the trustee may be removed or sued for damages.  

Fisher v. Miocene Oil & Gas Ltd., 335 Fed. Appx. 483, 486 (5th Cir. 2009).

Good faith is not a defense where the trustee has been negligent or has acted unreasonably.  

72 Tex. Jur. 3d Trusts § 70. The trustee is not liable for losses or depreciation that is ordinary and not a result of a breach of trust.  

Id. at (b). Should the trustee breach his or her duties under the trust, damages that may be recovered against the trustee include:

1. any loss or depreciation in value of the trust estate as a result of the breach of trust;
2. any profit made by the trustee through the breach of trust;
3. any profit that would have accrued to the trust estate if there had been no breach of trust.

Id. at (c). Should the trustee breach the trust, the court may order numerous remedies under Tex. Prop. Code Ann. § 114.008 (West). These include ordering the trustee to account, appointing a receiver to take possession of and administer trust property, suspension of the trustee, and other remedies.  

Further discussion of trusts and the duties of trustees is beyond the scope of this article, but the authors would direct your attention to the Section on the duties of parents as stewards of property held in trust or for the benefit of a minor, above.

E. Texas Uniform Transfers to Minors Act (TUTMA) [Tex. Prop. Code § 141.001-141.025]

Property may be transferred under the Texas Uniform Transfers to Minors Act by gift, legacy, or other method.  

Tex. Prop. Code §§ 141.005-141.008. The custodian shall:

1. take control of custodial property;
2. register or record title to custodial property if appropriate; and
3. collect, hold, manage, sell, convey, invest, and reinvest custodial property.

Tex. Prop. Code Ann. § 141.013(a) (West). The custodian must exercise a standard of care that would be observed by a prudent person dealing with property of another and must use any special skill or expertise he or she possesses in the management of the property.  

Id. at (b). One of the most important responsibilities for a custodian is to keep “separate and distinct” from non-custodial property the assets held for the benefit of the minor.  

Id. at (d). The custodian must also account and maintain records of his or her activities.  

Id. at (e).

The custodian may, for the minor’s benefit, use custodial property, invest it, or transfer it into trust.  

Id. at § 141.015. The custodian, like a trustee, is a fiduciary to the minor whose property is being beneficially held and has a duty to that minor to
administer the property for the minor’s benefit. The Virginia Supreme Court held custodians breached their fiduciary duty by breaching the prudent investor rule for the standard of care for speculative investments made in his personal investment account that were financed with UTMA funds, and were held liable to the sum of $40,000 for losses incurred from speculative investments, commingling of custodial property and personal property such that the custodial property could not be identified, and were ordered to pay the children’s attorney’s fees. Carlson v. Wells, 281 Va. 173 (2011).

Further discussion of TUTMA and custodial property and the duties of custodians is beyond the scope of this article, but the authors would direct your attention to the Section on the duties of parents as stewards of property held in trust or for the benefit of a minor, above.

F. Family Limited Partnership [26 U.S.C.A. § 704(e)]

The Family Limited Partnership (FLP) is a tax and estate planning vehicle under 26 U.S.C.A. § 704(e) (West). This Section, and accompanying regulations, provide the framework to treat certain partnership income to the younger members of the partnership. Typically, minors are not recognized as a member of the partnership unless it is shown either that the minor is competent to manage his or her own property and participate in partnership activities or control of the property is exercised by a fiduciary/custodian for the minor’s benefit.

An in depth discussion of fiduciary duties in partnerships is beyond the scope of this article, but a cursory discussion is appropriate due to the interaction of those duties and minors in FLPs. A partner owes to the partnership, and other partners, a duty of loyalty and care and must discharge his or her duties in good faith and in a manner reasonably believed to be in the partnership’s best interest. Tex. Bus. Org. Code Ann. § 152.204(a)-(b) (West); Hughes v. St. David's Support Corp., 944 S.W.2d 423 (Tex. App.-Austin 1997, writ denied). This duty also relates to the winding up of the partnership business. Tex. Bus. Org. Code Ann. § 152.204(b) (West); M.R. Champion, Inc. v. Mizell, 904 S.W.2d 617 (Tex. 1995). “A partner, in the partner's capacity as partner, is not a trustee and is not held to the standards of a trustee,” Tex. Bus. Org. Code Ann. § 152.204(d) (West), per se, but the courts have recognized that the relationship between partners is highly fiduciary in nature, and their dealings with each other are subject to same scrutiny, intendments and imputations as a transaction between an ordinary trustee and his cestui que trust. Gum v. Schaefer, 683 S.W.2d 803 (Tex. App.—Corpus Christi 1984, no writ), disapproved of on other grounds by Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc., 159 S.W.3d 87 (Tex. 2005).

In short, members of a FLP owe one another fiduciary duties under the business code and, additionally, may owe additional duties as a trustee or custodian to a minor who is a member of the partnership.
APPENDIX 1
Fiduciary Litigation: Duties and Obligations between Parent, Child, and Third Parties


Texas Jurisprudence Pleading and Practice Forms
Database updated October 2011
Chapter 98. Divorce and Separation
IV. Enforcement Proceedings
Summary Correlation Table

§ 98:100. Motion to enforce child support order by contempt

No. _______
In the Matter of
[Family] District
the Marriage of
Court of _______
County, Texas
________ ________ Judicial
District

________/Moving Party's/ Motion For Contempt For Failure to Pay Child Support

To the Honorable Court:

[Movant], who resides at [address], brings this motion to request the court to enforce, by contempt, prior orders entered in this action.

Respondent is [respondent's name], who resides at [address].

This court has continuing jurisdiction of the parties and of the following [child or children] who [is or are] not under the continuing jurisdiction of any other court:

Name: _______
Sex: _______
Birthplace: _______
Birth date: _______
Present residence: _______

[Provide similar information for each additional child].

Movant is the temporary managing conservator of the [child or children] who [is or are] the subject of this action. Respondent is the temporary possessory conservator of the [child or children] who [is or are] the subject of this action.

The [child or children] for whom the child support payments _______ were ordered _______ [has or have] not reached the age of 18 years, died, married, or become otherwise emancipated, and the order referred to above has not been amended in any way.

In support of this motion, movant shows:
1. On ________ [date], this court entered an order, designated as ________ [specify order], which appears of record in volume ________, page ________, of the minutes of this court, which states in relevant part as follows: ________ [quote portion of order that respondent has failed to obey].

In the order described above, movant is the person entitled to receive payment for the support of the ________ [child or children]. Respondent is the person required to contribute to the support of the ________ [child or children].

2. Respondent, ________ [respondent’s name], who is the person ordered to make the child support payments described above, has willfully disobeyed the order of this court by failing to make the following child support payments as ordered, and still remains in arrears as of the date of hearing:

a. On ________ [date], a payment of $________ was not made.

b. On ________ [date], a payment of $________ was not made.

c. The total amount of payments not timely made is $________.

Respondent, ________ [respondent’s name], is continually and purposely late in each payment of support, causing undue hardship on movant and the ________ [child or children].

3. Respondent, who is the person ordered to make the child support payments described above, has made the following payments, though untimely:

a. On ________ [date], a payment of $________ was made.

b. On ________ [date], a payment of $________ was made.

[c. On ________ [date], a payment of $________ was made.

The total amount of payments made, though untimely, is $________.

4. The total arrearage of child support installment payments that respondent, ________ [respondent’s name], has failed to pay, amounts to $________. Respondent failed to make these payments, though ________ [he or she] was able to obey the order of this court.

5. Based on respondent’s willful disobedience in the past of this court’s order, as set forth in Paragraph 2 above, it is probable that ________ [he or she] will likewise violate the order by failing to make child support payments in the manner and amount ordered by this court, on the ________ [days of month, e.g. first and fifteenth] days of each month from the date of filing this motion until the date on which this motion is heard. Movant requests this court to order respondent to make all child support payments due and owing as of the date of hearing, including those that have accrued since this motion was filed.

6. The total amount of child support in arrears is equal to or is in excess of the amount due for a ________ [two] month period at the time of filing of this motion, and movant requests the court to order respondent to post bond in the amount of $________ to secure the future payment of respondent’s child support obligations.

In addition, movant requests the court to order income withholding. Pursuant to Section 158.001 et seq. of the Texas Family Code, ________ [employer], or any subsequent employer of ________ [respondent], shall withhold from ________ [respondent’s] disposable earnings the sum of $________ per month, in equal installments from each remuneration paid by ________ [employer] to respondent during said month, said amounts withheld not to exceed the maximum amount, singly or in the aggregate, permitted by Section 303(b) of the Consumer Credit Protection Act, 15 U.S.C.A. § 1673(b).

Movant requests the court to enter an order including the following provisions:

It is ordered, adjudged, and decreed that the clerk of the court shall within five days of the signing of this order, upon receipt of a fee of ________ [$5] from ________ [person paying fee], cause a certified copy of this order to be delivered to
It is further ordered, adjudged and decreed that _______[employer] may deduct from monies paid to respondent, an administrative fee not to exceed _______($5) per month, with which respondent will be credited against the monthly child support obligation.

It is further ordered, adjudged and decreed that _______[employer] shall begin to withhold income in accordance with this order no later than the _______[pay period, e.g., first] pay period of _______[month] that occurs within _______[14] days following the date upon which this order is received by _______[employer], and shall continue to withhold income so long as respondent is obligated to make those payments and is employed or until _______[employer] is notified of further court orders relieving _______[employer] of this duty.

It is further ordered, adjudged and decreed that each such amount withheld by _______[employer] shall be remitted immediately, by cashier’s check, money order, employer’s check or other negotiable instrument, payable to _______[appropriate agency and address].

It is further ordered, adjudged and decreed that when and if respondent terminates employment with _______[employer], both _______[employer] and respondent shall notify the _______[appropriate court], and _______[other person to be notified] in writing within _______[seven] days of termination, said notice to contain the cause number, name of possessory conservator, name of managing conservator, the last known address or any subsequent employer of respondent, if known, and further, _______[person required to inform subsequent employer of court order, e.g., respondent] shall inform any subsequent employer of this order upon any subsequent employment.

7. It was necessary to secure the services of _______[attorney], a licensed attorney with the law firm of _______[law firm], to preserve and protect the rights of the _______[child or children], the subject(s) of this action and the movant, as well as to obtain past payments of the ordered support. Respondent should be ordered to pay a reasonable attorney fee and costs of court, and judgment plus interest should be rendered in favor of that attorney and against respondent, or in the alternative, that reasonable attorney fee should be taxed as costs and be ordered paid directly to the undersigned attorney. In addition, respondent should be ordered to pay to _______[attorney], an attorney fee incurred by movant for collecting past due support payments from respondent each and every time respondent was continually and purposely late in payment. Petitioner has incurred the sum of $________ for the collection of unpaid support in _______[year].

8. In the alternative, movant further shows the court that respondent presently owes to movant the sum of $________ for nonpayment of child support for a period of _______[two] payments as previously alleged, that all of those payments have matured, and that movant has a vested right in and to that sum and now requests the court to reduce such vested, matured installment payments to judgment and that she have her execution thereon, together with all costs of court and an attorney fee, and all additional child support payments that are due and owing as of the date of hearing.

9. Movant requests that an order be entered in this action granting her judgment in the total amount of $________ for the matured installment payments that are due and owing as of the date of hearing, plus the amount of an attorney fee the court may award in this action, and for all costs of court. To avoid any duplication of payments, she requests that the court provide that any payments made by respondent under the contempt order should be credited to the amount of her judgment, thereby reducing that judgment by the collected payments.

Prayer for Relief

Therefore, movant respectfully requests that this court:

1. Set a hearing and issue notice to respondent to appear and show cause why respondent should not be held in contempt of court for disobedience of the court’s order, and why movant should not recover from the respondent the sum of $________, plus all additional child support payments that are due and owing as of the date of hearing, plus attorney fees and court costs, by reducing the matured, vested child support payments to judgment, but that the order entered shall further provide that any payments made by respondent under the contempt proceedings shall be credited to that judgment so that there may be no double recovery against respondent, and why a reasonable attorney fee and costs should not be awarded to movant’s attorney;

2. Confine respondent in the _______ County jail until respondent complies with the order of the court;
3. Award movant general relief.

[Signature, State Bar of Texas identification number, address, telephone number, and, if available, telex number of at least one attorney of record]

Verification

State of Texas

County of ________

Before me, the undersigned notary public, on this day personally appeared ________ [name of party], known to me (or proved to me on the oath of ________ [description of identity card or other document]), who after being duly sworn, upon ________ [his or her] oath stated that ________ [he or she] is the ________ [party status] in the above-captioned cause; that ________ [he or she] has read the foregoing document; and that every statement contained therein is true and correct within ________ [his or her] personal knowledge.

[Signature of affiant]

SUBSCRIBED AND SWORN TO before me on this ________ [date], to which I place my signature and official seal.

[Signature of Notary Public]

[Printed Name of Notary Public]

My Commission Expires: ________

Notary Public for the State of Texas
APPENDIX 2
Plaintiff's [Original/ordinal number of petition] Petition

To the Honorable Judge of this court:

Plaintiff [name of plaintiff] files this petition complaining of defendants [name of defendant 1] and [name of defendant 2], and in support respectfully shows:

1. Plaintiff intends to conduct discovery in this action under Level [1/2/3] pursuant to Tex. R. Civ. P. 190.

2. Plaintiff [name of plaintiff] is an individual residing at [address of plaintiff].

3. Defendant [name of defendant 1] is an individual residing at [address of defendant 1]. Defendant may be served with process by serving [name of agent], [title of agent], at [address of agent].

4. Defendant [name of defendant 2] is an individual residing at [address of defendant 2]. Defendant may be served with process by serving [name of agent], [title of agent], at [address of agent].

5. Defendant [name of child] is an individual residing at [address of child]. Defendant may be served with process by serving [name of agent], [title of agent], at [address of agent].

6. This court has jurisdiction over the subject matter of this dispute under [citation of authority], in that [description of basis for jurisdictional claim].

7. Venue is proper in [name of county], Texas under [citation of authority], in that [description of basis for claim of venue].

8. Defendants [names of defendant 1] and [name of defendant 2] are the parents of defendant [name of child]. At all times mentioned in this petition, defendant [name of child] was under the exclusive control and custody of [his/her] parents, with whom defendant [name of child] resides.

9. Sometime during [date of prior attack], defendant [name of child] without provocation, willfully and maliciously struck
plaintiff’s child, [name of plaintiff’s child] causing painful bodily injuries. On [date of informing authorities], plaintiff advised defendants [name of defendant 1] and [name of defendant 2], and juvenile authorities, that the incident had taken place.

11. On [date of injury complained of], at [location of injury], at approximately [time of injury], defendant [name of child] again, without provocation, willfully and maliciously struck [name of plaintiff’s child] with [identification of object], knocking [name of plaintiff’s child] to the ground, then restrained [name of plaintiff’s child] from getting up, and forcefully and repeatedly struck [name of plaintiff’s child] on and about the face and head with [identification of object], inflicting serious and disfiguring bodily injuries requiring extensive medical treatment. These injuries may not be correctable and have caused, are causing and will continue to cause [name of plaintiff’s child] severe physical and mental pain and suffering.

12. As the direct and proximate result of the unprovoked attack of defendant [name of child] on [name of plaintiff’s child], plaintiff has incurred medical expenses, and will incur medical expenses in the future, in an amount within the jurisdictional limits of this court.

13. Defendants [name of defendant 1] and [name of defendant 2], prior to the time of the second attack of their child on [name of plaintiff’s child] knew of their child’s tendency toward violent acts, and specifically of their child’s previous violence against [name of plaintiff’s child]. Despite that knowledge, defendant [name of defendant 1] and [name of defendant 2] made no reasonable effort to correct or restrain defendant [name of child] from committing such violent acts. As a result, defendants [name of defendant 1] and [name of defendant 2] encouraged and acquiesced in defendant [name of child]’s violent acts. Defendants’ failure to correct or restrain their child is the direct and proximate cause of the injuries suffered by [name of plaintiff’s child].

14. Defendants’ conduct as described above constituted gross negligence, in that defendants acts or omissions, when viewed objectively from the standpoint of the defendants at the time of the occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others. Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, and welfare of others, including plaintiff. As a result, plaintiff seeks exemplary damages in this action under Sections 41.001 et seq. of the Texas Civil Practices and Remedies Code.

Prayer for Relief

Therefore, plaintiff [name of plaintiff] respectfully requests judgment against defendants, jointly and severally, as follows:

1. For compensatory and punitive damages in an amount within the jurisdictional limits of this court;

2. Pre- and postjudgment interest on those amounts as permitted by law;

3. For costs of suit; and

4. For any other relief to which plaintiff is entitled.

Respectfully submitted,

[Name of plaintiff’s attorney]
Attorney for Plaintiff

Texas Driver’s License Number: [last three digits of license number of plaintiff]
Social Security Number: [last three digits of social security number of plaintiff]
[Name of law firm of plaintiff’s attorney]
[Address of plaintiff’s attorney]
[Telephone number of plaintiff’s attorney]
[State bar number of plaintiff’s attorney]
[Certificate of service, see § 184:111]
APPENDIX 3
Pattern Jury Charge 104.2: Question and Instructions – Breach of Fiduciary Duty with Burden on Fiduciary

QUESTION ______

Did Don Davis comply with his fiduciary duty to Paul Payne?

[Because a relationship of trust and confidence existed between them,] [As Paul Payne’s attorney,] [Because they were partners,] [As Paul Payne’s agent,] Don Davis owed Paul Payne a fiduciary duty. To prove he complied with his duty, Don Davis must show—

a. the transaction[s] in question [was/were] fair and equitable to Paul Payne; and

b. Don Davis made reasonable use of the confidence that Paul Payne placed in him; and

c. Don Davis acted in the utmost good faith and exercised the most scrupulous honesty toward Paul Payne; and

d. Don Davis placed the interests of Paul Payne before his own, did not use the advantage of his position to gain any benefit for himself at the expense of Paul Payne, and did not place himself in any position where his self-interest might conflict with his obligations as a fiduciary; and

e. Don Davis fully and fairly disclosed all important information to Paul Payne concerning the transaction[s].

Answer “Yes” or “No.”

Answer: _______________
APPENDIX 4
Pattern Jury Charge 104.3: Question and Instructions – Breach of Fiduciary Duty with Burden on Beneficiary

QUESTION ______

Did Don Davis fail to comply with his fiduciary duty to Paul Payne?

To prove Don Davis failed to comply with his fiduciary duty, Paul Payne must show—

a. the transaction[s] in question [was/were] not fair and equitable to Paul Payne; or

b. Don Davis did not make reasonable use of the confidence that Paul Payne placed in him; or

c. Don Davis failed to act in the utmost good faith or exercise the most scrupulous honesty toward Paul Payne; or

d. Don Davis placed his own interests before Paul Payne’s, used the advantage of his position to gain a benefit for himself at the expense of Paul Payne, or placed himself in a position where his self-interest might conflict with his obligations as a fiduciary; or

e. Don Davis failed to fully and fairly disclose all important information to Paul Payne concerning the transaction[s].

Answer “Yes” or “No.”

Answer: ________________
APPENDIX 5
Pattern Jury Charge 115.18: Question – Actual Damages for Breach of Fiduciary Duty

[Insert predicate, PJC 115.1.]

QUESTION ______

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Paul Payne for his damages, if any, that were proximately caused by such conduct?

Consider the following elements of damages, if any, and none other.

[Insert appropriate instructions. See examples in PJC 115.3 and 115.9.]

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

a. [Element A] sustained in the past.

Answer: _______________

b. [Element A] that, in reasonable probability, will be sustained in the future.

Answer: _______________

c. [Element B] sustained in the past.

Answer: _______________

d. [Element B] that, in reasonable probability, will be sustained in the future.

Answer: _______________
APPENDIX 6
Pattern Jury Charge 115.18: Question and Instructions - Misapplication of Fiduciary Property as Ground for Removing Limitation on Exemplary Damages

Answer the following question only if you unanimously answered “Yes” to Question ______ [85.1]. Otherwise, do not answer the following question.

To answer “Yes” to [any part of] the following question, your answer must be unanimous. You may answer “No” to [any part of] the following question only upon a vote of ten or more jurors. Otherwise, you must not answer [that part of] the following question.

QUESTION ______

Did Don Davis intentionally misapply [identify property defendant held as a fiduciary] in a manner that involved substantial risk of loss to Paul Payne [and was the value of the property $1,500 or greater]?

“Misapply” means a person deals with property [or money] contrary to an agreement under which the person holds the property [or money].

“Substantial risk of loss” means it is more likely than not that loss will occur.

A person acts with intent with respect to the nature of his conduct or to a result of his conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer “Yes” or “No.”

Answer: ________________
Fiduciary Litigation
Duties and Obligations
Between Parent, Child, and
Third Parties

By
John F. Nichols, Sr.
Tristan H. Longino

Forward

- “Parents generally stand in the role [status] of fiduciaries toward their
  minor children.” S.V. v. R.V., 933 S.W.2d 1,8 (Tex. 1996) (brackets
  added)

I. Introduction

A. Introduction

The fiduciary relationship [status] is created by:

1. statute;
2. common law; or
3. contract
II. The Fiduciary Relationship

A. The Fiduciary

Q. What is a “fiduciary?”
A. Any person who occupies a position of “peculiar confidence” towards another.  
   *Kinzbach Tool*

B. The Fiduciary Relationship

   Arises when one is under a duty to act or give advice for the benefit of another.  
   *TX. Bk. & Tr. v. Moore*

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<table>
<thead>
<tr>
<th>II. The Fiduciary Relationship (cont’d)</th>
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<tbody>
<tr>
<td><strong>1. Formal relationships –</strong></td>
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<tr>
<td>arise as a “matter of law”</td>
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<tr>
<td>Example: UTMA (Uniform Transfers To Minors Act)</td>
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<tr>
<td><strong>2. Informal relationships –</strong></td>
</tr>
<tr>
<td>arise as a “matter of fact”</td>
</tr>
</tbody>
</table>

| 3. Duties (formal/informal) of or to: |
|  (1) Loyalty:                        |
|  (2) Act prudently;                  |
|  (3) Render accurate accounts;       |
|  (4) Full disclosure                  |

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<table>
<thead>
<tr>
<th>II. The Fiduciary Relationship (cont’d)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>C. Breach of Fiduciary Duty - Analysis</strong></td>
</tr>
<tr>
<td>(1) Is there a duty?</td>
</tr>
<tr>
<td>(2) Is there a breach?</td>
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<tr>
<td>(3) Did the breach cause/result in damages?</td>
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<td>(4) What were the actual damages?</td>
</tr>
<tr>
<td>(5) Was there fraud, malice, or gross negligence?</td>
</tr>
<tr>
<td>(6) What are the exemplary damages?</td>
</tr>
</tbody>
</table>

| (1) through (6) may be determined by statute, contract, or common law. |
III. References

A. Status
Erisa, guardianships, ad litem, next friends, personal reps, POAs, marriage/minors, trustees.

B. Common Law
Executors/Trustees, POAs, spouses

C. Books, Articles & Treatises
Joyce Moore

IV. Marriage & Emancipation – Minors

A. Marriage of Minors
1. Minors lack capacity to consent to marry.
2. Ceremonial marriage of minors requires parental consent.
3. Common law marriage of minors is not recognized.
4. Annulment of marriage of minors under age 18 is permitted.
5. Texas may grant comity to a valid out-of-state marriage of a minor.

IV. Marriage & Emancipation – Minors (con’t)

B. Emancipation of Minors Through Marriage.
Marriage emancipates a minor.

C. Duration of Emancipation of Minor Through Marriage.
Divorce of a minor does not reinstate minority status.
V. The Parent – Child Relationship

A. Parent’s Rights and Duties
   (1) health;
   (2) education;
   (3) welfare;
   (4) support; and
   (5) management.

B. Child’s Rights and Duties
   (1) support; and
   (2) protection of their assets.

V. The Parent – Child Relationship (con’t)

C. Adoptive Parents
   (1) Stand in shoes of biological parent.
   (2) Does not affect rights of grandparents.

D. Rights of Extended Relatives
   Must establish “standing.”

E. Rights of Siblings
   Siblings have a right of access.

F. Gestational Agreements
   Intended parents have superior rights over the surrogate, if proper filings have been made.

VI. Liability of Parties

A. Liability of Parents to Children
   1. Duty of Support
      Includes food, clothing, shelter, medical, dental, education, care, control, protection, and reasonable discipline, before and after divorce.

   2. Harm to Child
      Parental immunity from liability arising out of parental activities of: 1) supervision, 2) discipline, 3) providing a home, 4) providing food, 5) schooling, 6) medical care, 7) recreation, and 8) family chores.
VI Liability of Parties (con’t)

Exceptions to Parental Immunity For a Child:
1. willful, malicious or intentional wrongs against a child or abandonment of responsibility;
2. business matters where parent is employer and child is employee; and
3. negligent operation of a motor vehicle.

3. Parents as Fiduciaries
   A. Liability for waste of child’s assets once fiduciary relationship is established.
   B. Liability of parents for the conduct of their Children.
      I. Generally a parent is not liable for torts of a child.

II. Harm to Property
   Exception 1) negligent conduct of child due to parental failure to exercise a duty, 2) malicious conduct of child between age 10 and 18.

VI Liability of Parties (con’t)

Exceptions to the rule are:
1) agency for child, 2) negligent entrustment, 3) ratification, 4) parental direction in the tort, and 5) course and scope of duties imposed by parent.

II. Harm to Property
   Exception 1) negligent conduct of child due to parental failure to exercise a duty, 2) malicious conduct of child between age 10 and 18.

VI. Liability of Parties (con’t)

III. Harm to Persons
   Rodriguez v. Spencer – a parent is under a duty to exercise reasonable care to control his/her child from the commission of intentional and unintentional torts.

C. Liability of Child to Others
   As a general rule, minors are civilly liable for their own torts. Childers v. A.S., citing Rodriguez v. Spencer

D. Limitations
### VII. Fiduciary Duties of Court Appointees
#### In SAPCR Actions

**A. Introduction**

Generally, a fiduciary duty arises in a parent-child action appointment if the best interest of the child is an issue.

**B. Attorney Ad Litem**

An attorney ad litem is the attorney for the child, who is the client.

**C. Guardian Ad Litem**

Acts as an officer or advisor to the court, but must act as fiduciary with respect to the child's interests. *Grunewald v. Technibilt.*

**D. Amicus Attorney**

An attorney appointed to provide legal services necessary to assist the court in protecting the child's best interests rather than providing legal services to the child.
VII. Fiduciary Duties of Court Appointees
In SAPCR Actions

E. Derived Judicial Immunity

The absolute immunity of the court and appointees of the court (attorneys, psychologists, psychiatrists) to whom the courts delegate their authority, or who are requested to perform services, is referred to as “derived judicial immunity” as an “arm of the court.”

Exception – conscious indifference, reckless disregard, bad faith or malice or gross negligence or willful and wrongful conduct.

VIII. Statutes – Codes and Rules

Creating Fiduciary Duties to Children

A. Erisa Fiduciaries

Plans designated for family child support can create a constructive trust and any wasting of assets could be a breach of fiduciary duty.
VIII. Statutes – Codes and Rules

B. Guardian and Ward
   A guardian takes possession of a ward’s property and manages the estate of the ward as a prudent person would manage their own property.

C. Next Friends
   Next friends bear the same responsibilities as a guardian.

D. Trustees
   A trustee is liable for the negligent administration of the trust.

E. Texas Uniform Transfers to Minors Act (TUTMA)
   The custodian, like a trustee, is a fiduciary to the minor whose property is being beneficially held and has a duty to the minor to administer for the minor’s benefit.

F. Family Limited Partnership
   A partner owes to the partnership, and other partners, a duty of loyalty and care and must discharge his or her duties in good faith and in a manner reasonably believed to be or the partnership’s best interest.